

1 of 2 DOCUMENTS

PETITION FOR DECLARATORY RULING BY ALABAMA'S RURAL INCUMBENT
LOCAL EXCHANGE CARRIERS

In re: Request for a Declaratory Ruling upholding the applicability of tariff provisions
governing compensation for indirect CMRS traffic

DOCKET 28988

Alabama Public Service Commission

2004 Ala. PUC LEXIS 27

January 26, 2004, Done

PANEL: [*1] Jim Sullivan, President; Jan Cook, Commissioner; George C. Wallace, Jr., Commissioner

OPINION: DECLARATORY ORDER

BY THE COMMISSION:

I. INTRODUCTION AND BACKGROUND

This Declaratory Proceeding was initially established in response to a Petition filed by the Alabama Independent Telephone Companies listed in Appendix A hereto ("the Rural LECs") on June 11, 2003 and amended on July 1, 2003. The Rural LECs sought a Declaratory Ruling from the Commission upholding the applicability of the various tariff provisions that each of the Rural LECs have which govern third party Commercial Mobile Radio Service ("CMRS") traffic delivered to the Rural LECs for termination. n1 The Rural LECs specifically sought a Declaratory Ruling from the Commission holding that the Rural LECs are to be compensated for all charges imposed by the aforementioned tariff provisions for the termination of third party CMRS traffic delivered by BellSouth Telecommunications, Inc. ("BellSouth") to the Rural LECs. n2

n1 CenturyTel of Alabama, LLC ("CenturyTel") joined in support of the Motion but noted that some of the statements applicable to historic BellSouth-Rural LEC compensation arrangements were not applicable to CenturyTel. It was further noted that unlike many of the Rural LECs, CenturyTel had in place agreements providing for direct interconnection with many CMRS providers. It was represented that CenturyTel's tariff provisions related to indirect CMRS termination were contained in CenturyTel's Wireless Local Termination Tariff on file with the APSC. [*2]

n2 See Rural LEC Petition of June 11, 2003 at p.1

In support of their Petition, the Rural LECs asserted that under network arrangements created and maintained under the regulation of the Commission, traffic originating in BellSouth's service areas is terminated to the Rural LECs over common facilities constructed and maintained under the oversight of the Commission. The Rural LECs asserted that such traffic included interexchange traffic originated from BellSouth customers. n3

n3 *Id.* at pp. 1-2

The Rural LECs noted that they were being compensated by BellSouth for the interexchange traffic delivered by BellSouth over common facilities in accordance with tariffs and applicable orders of the Commission. The Rural LECs asserted, however, that compensation issues had arisen with respect to indirect CMRS traffic because BellSouth also utilizes the aforementioned common facilities to deliver CMRS traffic terminated via BellSouth [*3] tandems to the Rural LECs. n4

n4 *Id.*

The Rural LECs pointed out that until 2002, BellSouth compensated the Rural LECs for indirect CMRS traffic on the same basis as other traffic terminated over the common facilities described above. In early 2002, however, BellSouth declared its intention to terminate payments to the Rural LECs for indirect CMRS traffic. The Rural LECs accordingly petitioned the Commission to initiate proceedings to address BellSouth's stated intention to terminate such payments.

As further noted by the Rural LECs, the Commission entered an Order on September 12, 2002 which, among other things, provided a short extension for BellSouth's payment to Rural LECs for the termination of certain CMRS traffic. n5 Said Order also provided for continuing Commission oversight to help ensure that the Rural LECs received sufficient billing records to allow them to assess originating CMRS carriers for any traffic indirectly delivered to the Rural LECs. Under the aforementioned Order issued by the Commission, [*4] BellSouth was to continue to compensate the Rural LECs at a 3.2 cent per minute rate for terminating wireless to land traffic from CMRS providers who had not converted to meet-point billing arrangements. n6

n5 *In re: Intercarrier Compensation*, Docket 28642 (Alabama Public Service Commission, September 12, 2002)

n6 *See* Rural LEC Petition of June 11, 2003 at p.2.

The Rural LECs represented that on November 1, 2002, BellSouth terminated payments related to indirect traffic from Cingular Wireless ("Cingular"). The Rural LECs maintained that such traffic constituted the bulk of the CMRS traffic delivered over common facilities by BellSouth to the Rural LECs for termination. n7 The Rural LECs further asserted that Cingular and other CMRS providers had, for the most part, refused to compensate the Rural LECs for terminating traffic while continuing to take advantage of arrangements with BellSouth to terminate traffic to the Rural LECs over common facilities. n8 The Rural LECs alleged that because the indirect CMRS [*5] traffic in question was being delivered by BellSouth over common facilities, they had been unable to contemporaneously identify and block the indirect traffic of the CMRS carriers who had not entered meet-point billing agreements and who had otherwise failed or refused to compensate the Rural LECs according to their tariff provisions governing compensation for indirect traffic. n9

n7 *Id.* n8 The Rural LECs recognized that Cingular and certain other CMRS providers had executed a limited number of meet-point billing arrangements which compensated the affected Rural LECs in lieu of their existing tariffs. *See* Rural LEC Petition of June 11, 2003 at pp. 2 and 3.

n9 *See* Rural LEC Petition of June 11, 2003 at p.3

The Rural LECs maintained that they each had Commission approved tariffs that established rates for the indirect CMRS traffic in dispute. The Rural LECs argued that each of their tariffs had provisions applicable to "terminating traffic transported over BellSouth facilities pursuant to interconnections [*6] or resale arrangements between BellSouth and other telecommunications providers." n10 The Rural LECs asserted that such provisions typically located both in the General Subscriber Services Tariff and the Access Tariff of each of the Rural LECs. The Rural LECs noted that the application of such rate elements resulted in a per minute rate of approximately 3.2 cents per minute. The Rural LECs

surmised that said rates constituted approximately one-half of the effective per minute access charge rate assessed by the Rural LECs. n11

n10 A list of the tariff provisions of each Rural LEC were attached to their Petition as Exhibit "B" and are attached to this Order as "Appendix B".

n11 See Rural LEC Petition of June 11, 2003 at p. 3.

Following a review of the Petition of the Rural LECs, the Commission determined that the question presented by the Rural LECs should be reviewed and clarified by the Commission. The Commission accordingly entered an Order on July 31, 2003 seeking comments from interested parties concerning [*7] the enforceability of the tariff provisions cited by the Rural LECs with respect to indirect CMRS traffic. The deadline established by said Order for the filing of Initial Comments was on or before August 29, 2003. The deadline for the filing of reply comments was established as September 19, 2003.

II. SUMMARY OF THE INITIAL COMMENTS RECEIVED

A. Overview

In response to the Commission's Order of July 31, 2003, Initial Comments were received from the Rural LECs; AT&T Communications of the South Central States, LLC ("AT&T"); BellSouth Telecommunications, Inc. ("BellSouth"); and a group of Wireless Carriers, including AT&T Wireless Services, Inc.; BellSouth Mobility, LLC, d/b/a Cingular Wireless; CELCO PARTNERSHIP, d/b/a VERIZON WIRELESS; and SprintCom, Inc.; and Sprint Spectrum L.P., d/b/a Sprint PCS (the "Wireless Carriers"). A summary of the comments of each party is set forth below.

B. The Initial Comments of the Rural LECs

The Rural LECs seek a declaration affirming that the identified tariff provisions apply to wireless traffic transported over BellSouth's facilities to the Rural LECs pursuant to interconnection or resale arrangements between BellSouth and [*8] other telecommunications providers, except in those instances where those tariff provisions have been supplanted by an APSC approved interconnection agreement between the petitioning Rural LEC and CMRS provider. The Rural LECs assert that such a declaration by the Commission is necessary due to the Rural LECs' inability to contemporaneously identify and control the delivery of indirect CMRS traffic by BellSouth over common facilities, and the failure of certain CMRS providers to acknowledge such tariffs and compensate the Rural LECs appropriately. n12

n12 Rural LEC Initial Comments at pp. 1-3.

According to the Rural LECs, Alabama is just one of many states that has approved tariff provisions governing payment for wireless traffic in instances where another superceding agreement has not been approved. The Rural LECs assert that they are in fact required by law to file tariffs providing charges for all regulated intrastate service except in those instances where the APSC has issued an Order approving or imposing other, [*9] superceding terms. n13

n13 *Id.* at pp. 3-4.

The Rural LECs further maintain that the application of the tariff provisions they seek to enforce with respect to indirect CMRS traffic do not violate § 251 and 252 of the Telecom Act of 1996. n14 The Rural LECs concede that they are subject to the general obligations of § 251(b) of the Telecom Act which in relevant part requires them to establish reciprocal compensation for the transport and termination of telecommunications traffic. n15 According to the Rural LECs, § 251(b) does not, however, provide guidance as to the obligation to "establish" reciprocal compensation relating to such "transport and termination." In that regard, the Rural LECs dispute the notion that as a matter of law, the delivery of third party CMRS traffic by BellSouth over common facilities constitutes "transport and termination" between the Rural LECs and the CMRS providers for purposes of reciprocal compensation requirements. n16

n14 Pub. L. No. 104-104, 110 Stat. 56 (1996) (the "Telecom Act"); 47 U.S.C. § 151 *et seq.* References to sections of the Telecom Act are according references to the provision of 47 U.S.C. [*10]

n15 Rural LEC Initial Comments at pp. 3-4 § 251(b)(5).

n16 *Id.* at pp. 5-6.

According to the Rural LECs, the Federal Communications Commission (the "FCC") has clearly drawn a distinction between the general duty to interconnect and the duty to transport and terminate traffic. n17 The Rural LECs contend that while ILECs and CMRS providers are certainly free to agree to provide reciprocal compensation for such indirect traffic, it is far from certain that they have an obligation to do so. n18

n17 *Id.* at pp. 5-6; *Citing In the Matter of Total Telecommunications Services, Inc. and Atlas Telephone Company, Inc. v. AT&T Corp.*, File No. E-97-003, Memorandum, Opinion and Order, 16 F.C.C.R. 5726 p. 11, (rel. March 13, 2001) (footnotes omitted).

N18 *Id.*

The Rural LECs further maintain that even if the delivery of the traffic at issue in this proceeding by BellSouth to the Petitioners constitutes [*11] "transport and termination" between the CMRS providers and the Petitioners for purposes of reciprocal compensation requirements of § 251(b)(5), there is no obligation to establish reciprocal compensation for such traffic where it was delivered to the ILEC prior to the establishment of an agreement providing for reciprocal compensation. n19 In such instances the Rural LECs maintain that Commission approved tariffs are a lawful basis upon which to bill for terminating traffic. n20

n19 *Id.* at p. 6; *Citing Sprint Spectrum L.P., d/b/a Sprint PC et al. v. Missouri Public Service Commission, et al.*, 2003 WL 1961081 (Mo. App. W.D. Apr. 29, 2003); *Alma Telephone Company et al. v. Missouri Public Service Commission et al.*, Cole County Circuit Court, Case No. 02CV324810 (May 13, 2003).

n20 *Id.*

The Rural LECs further assert that state tariffs have not been preempted by the Telecom Act and that carriers must still follow the provisions of the Act with regard to requests for interconnection [*12] agreements including the remedies for disputes. The Rural LECs generally maintain that the courts have recognized that carriers have the right to purchase services from ILECs pursuant to existing ILEC tariffs without negotiating interconnection agreements, but have an incentive to negotiate prices and terms that are more favorable than those set forth in the local exchange company's tariff provisions. n21 The Rural LECs also assert that tariff provisions are not only appropriate, but are necessary in instances where interconnection agreements have not been negotiated by the parties or imposed by the APSC via arbitration proceedings. n22

n21 *Id.* pp. 6-7; *Citing U.S. West Communications v. Sprint et al.* 275 F.3d 1241, 1250 (10th Cir. 2002) and *Three Rivers Telephone Cooperative v. US West Communications*, 45 Fed. Appx. 698 2002 WL 1986469 (9th Cir. Mont. 2002) (unpublished); *rev'g* 125 F. Supp.2d 417 (D. Mont. 2000).

n22 *Id.*

[*13]

The Rural LECs further maintain that because of the manner in which BellSouth delivers wireless traffic to the Rural LECs, it is impossible for the Rural LECs to contemporaneously identify the wireless traffic, much less try to require that arrangements be in place prior to its delivery. The Rural LECs accordingly maintain that the tariff provisions they seek to enforce are not an attempt to circumvent an interconnection agreement and are to be applied only in the absence of interconnection agreements. The Rural LECs argue that tariffs are particularly needed in the case of rural telephone companies who are exempt from various obligations of the Telecom Act. The Rural LECs maintain that they do not otherwise have the resources to ensure that traffic at issue in this proceeding is not delivered to them without appropriate payment arrangements in place. n23

n23 *Id.* at pp. 7-8.

The Rural LECs further assert that CMRS carriers cannot currently be compelled to negotiate interconnection agreements or to submit to state [*14] Commission arbitration where negotiations are unsuccessful. n24 According to the Rural LECs, this does not present a problem with regard to direct CMRS-LEC interconnection since CMRS carriers must first approach LECs in order to obtain facilities and/or specific services. The Rural LECs maintain, however, that there is a huge problem where indirect traffic is concerned because the majority of CMRS traffic terminating to Rural LECs is routed through Regional Bell Operating Company ("RBOC") tandems and delivered over common trunk groups. n25

n24 *Id.* at p. 8; Citing 47 U.S.C. § 251(b) and (c); *In the Matter of Communique Telecommunications, Inc., d/b/a Logical Application*, 14 F.C.C.R. 13635, 13649 (Aug. 9, 1999).

n25 *Id.*

According to the Rural LECs, the indirect interconnection discussed above makes it impossible for the Rural LECs to contemporaneously identify and block traffic originated by CMRS carriers. The Rural LECs further contend [*15] that efforts to identify such traffic and bill CMRS carriers for terminating same are often ignored. The Rural LECs assert that as long as the majority of traffic between CMRS carriers and the Rural LECs originate with CMRS carriers, there will be a built-in incentive for such carriers to perpetuate the status quo. The Rural LECs also maintain that there is a threat that some CMRS carriers may attempt to take advantage of this "loophole" by increasing traffic volumes delivered through RBOC facilities. n26

n26 *Id.* at pp. 8-9.

In response to the arguments of the CMRS carriers that they stand ready, willing and able to enter into an agreement for the payment of reciprocal compensation for indirect traffic, the Rural LECs point out that over the last year, not a single petition has been filed with the APSC by a CMRS provider seeking arbitration of an interconnection agreement to supercede the Rural LEC tariff provisions at issue in this cause. The Rural LECs assert that their attempts to enter into arrangements with [*16] the Wireless Carriers for the payment of reciprocal compensation for indirect CMRS traffic have only resulted in unreasonable demands from the CMRS providers regarding the rates and terms for the traffic at issue. n27

n27 *Id.* at p. 9.

In conclusion, the Rural LECs maintain that unless the Commission affirms the applicability of the Rural LECs' tariff provisions at issue, some CMRS providers will continue to seek to bypass their payment obligations by securing arrangements through which BellSouth terminates indirect CMRS traffic to the Rural LECs over common facilities without compensation. The Rural LECs assert that an unambiguous statement by the Commission affirming the applicability of the tariff provisions at issue to the wireless traffic in question will, in the absence of Commission

approved interconnection agreements, go a long way towards ensuring that appropriate arrangements are implemented for those seeking to utilize rural networks. n28

n28 *Id.* pp. 9-10.

[*17]

C. The Initial Comments of the Wireless Carriers

In their Initial Comments, the Wireless Carriers urge the Commission to deny the Petition of the Rural LECs and to order the Rural LECs to participate in good faith in the task force/mediation process established in the Commission's September 12, 2002, Order in Docket 28642. In the alternative, the Wireless Carriers urge the Commission to require the Rural LECs to establish reciprocal compensation arrangements pursuant to the procedural and substantive standards established in the Telecom Act. n29

n29 *See* Wireless Carriers Initial Comments at pp. 1-2.

The Wireless Carriers note that in response to the Commission's September 12, 2002, Order in Docket 28642, they participated in the informal mediation sessions conducted by the Commission staff at the Commission's offices in Montgomery, Alabama in April 2003. As a result of an informal mediation session held on April 2, 2003, the CMRS providers maintain that they submitted a proposed interim arrangement dated [*18] April 9, 2003, which was in response to the Rural LECs stated desire to receive monetary compensation other than in the form of exchanging traffic on a bill and keep basis during the pendency of these proceedings. Specifically, the CMRS providers maintain that they proposed a reciprocal compensation rate of 1.4 cents per minute, subject to true-up, a traffic split of 65 percent mobile-originated -- 35 percent land-originated, and terms designed to commit the parties to a binding negotiation/arbitration process consistent with the Telecom Act.

The Wireless Carriers assert that a counter-proposal altering the traffic split to 70%/30 mobile originated/land originated was also rejected by the Rural LECs. n30 The Wireless Carriers accordingly assert that they have participated in good faith negotiations with the Rural LECs and made at least two offers regarding a per minute rate and split for the traffic in question which were not accepted by the Rural LECs. Despite being available for further mediation, the CMRS providers represent that they did not receive any further indication of the Rural LECs' position on the matters in controversy until they learned on June 30, 2003 that the Rural [*19] LECs had filed the Petition for a Declaratory Ruling under consideration herein. n31

n30 *Id.* at pp. 3-4.

n31 *Id.* at pp. 4-5.

Regarding the merits of the relief requested by the Rural LECs, the Wireless Carriers maintain that the attempted enforcement of the intrastate access services tariffs of the Rural LECs with respect to the indirect traffic of the CMRS providers at issue would be inconsistent with federal law. According to the Wireless Carriers, the Telecom Act establishes an explicit and detailed procedure for obtaining compensation for terminating local traffic which the Rural LECs may not opt out of through enforcement of their tariff provisions. The Wireless Carriers assert that neither the Rural LECs nor the Commission may ignore the detailed procedures established by federal law. n32

n32 *Id.* at pp. 6-7.

The Wireless Carriers [*20] assert that the United States Supreme Court has recognized that, "where a federal statute establishes a comprehensive procedural mechanism for the resolution of particular issues, a state may not address the same issues, even under the same substantive standards" using procedures which differ from those established by federal law. n33 According to the Wireless Carriers, courts have specifically held that state tariff procedures cannot be

employed to address matters which are properly the subject of interconnection agreements under §§ 251 and 252 of the Telecom Act. n34 The Wireless Carriers accordingly contend that the Commission is without authority to grant the relief requested by the Rural LECs and assert that tariffs may not be used to circumvent the detailed process established in the Act for negotiating interconnection agreements. n35

n33 *Id.* at pp. 67; *Citing Amalgamated Association of Street Railway Employees v. Lockridge*, 403 U.S. 274 (1971) (quoting *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 243 (1959)). n34 *Id.* at p. 8, *Citing MCI Telecomms., Corp. v. GTE Northwest, Inc.*, 41 F.Supp.2d 1157, 1178. (D. Or. 1999); *Verizon North v. Strand*, 104 F. Supp.2d 803 (W. D. Mich. 2000). [*21]

n35 *Id.* at p. 10.

The Wireless Carriers further assert that even if tariffs are an appropriate mechanism to establish rates for the transport and termination of CMRS originated traffic under the Telecom Act, the tariffs at issue in this proceeding are in violation of the substantive requirements of the Act. More particularly, the Wireless Carriers note that the Telecom Act imposes on all LECs "the duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications." n36 The Wireless Carriers accordingly assert that the duty to pay reciprocal compensation is not optional and clearly applies even when the traffic involves a CMRS provider. n37

n36 *Id.*; *Citing 47 U.S.C. § 251(b)(5)*. n37 *Id.* at pp. 10-11; *Citing In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 11 F.C.C.RCD 15499 (1996) ("The Local Competition Order") at p. 1008.

[*22]

The Wireless Carriers further represent that the Rural LEC tariff provisions at issue are not mutual as required by the Act. The Wireless Carriers in fact assert that such tariff provisions are unilateral in that they provide for compensation for mobile to land traffic, but do not provide for any compensation to CMRS providers for terminating land to mobile traffic as required by the Telecom Act and the FCC's implementing rules. n38 The Wireless Carriers further assert that the rates in the tariff provisions at issue are simply derived from the Exchange Carrier Association's Interstate Access Charge Tariff and consequently are not based upon the costs associated with the transport and termination of intra-MTA traffic. In this regard, the Wireless Carriers point out that the FCC has repeatedly held that reciprocal compensation, and not access charges, applies to intra-MTA traffic. n39

n38 *Id.*; *Citing 47 C.F.R. §§ 51.701 and 51.703(a)*. n39 *Id.* at p. 12; *Citing Local Competition Order* at PP1036-1043; and *Intercarrier Compensation for ISP-Bound Traffic, Order on Remand, FCC 01-131*, 16 FCC Rcd. 9151, P47 (Rel. April 27, 2001), ("ISP Remand Order") *Remanded by WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. May 3, 2002).

[*23]

The Wireless Carriers assert that the Rural LECs have provided no evidence whatsoever that the tariffed rates at issue are comprised of cost based rate elements appropriately applied to the transport and termination of CMRS traffic. The Wireless Carriers further assert that it seems highly unlikely that the Rural LECs could make such a demonstration since the tariff rate of 3.2 cents per minute exceeds by several magnitudes the negotiated rates contained in similar interconnection agreements, including rates contained in interconnection agreements with Wireless Carriers. n40

n40 *Id.*

The Wireless Carriers lastly assert that a grant of the relief requested by the Rural LECs would have an inequitable result in contravention of the public interest. According to the Wireless Carriers, the Rural LECs are merely attempting to utilize their access tariffs to circumvent the mediation process established by the Commission's September 12, 2002 Order in Docket 28642 as well as the negotiation/arbitration process established [*24] by the Telecom Act. The Wireless Carriers note that this is not a situation where the Rural LECs were "forced" to file tariffs because the originating carriers refused to compensate or to negotiate an agreement. To the contrary, the Wireless Carriers maintain that they have made considerable efforts to work with the Commission staff and the Rural LECs to arrive at a fair and speedy resolution of the issues involved in the Petition of the Rural LECs. n41

n41 *Id.* at p. 13.

The Wireless Carriers maintain that approving the Rural LECs' tariffs would fundamentally change the bargaining power of the parties and make it difficult for CMRS providers to negotiate any interconnection agreement. n42 The Wireless Carriers accordingly urge the Commission to deny the relief requested by the Rural LECs and reconvene an informal negotiation process in an effort to resolve the issues outstanding. n43 In the alternative, the Wireless Carriers assert that the Commission should inform the Rural LECs that they should rely on their rights [*25] under federal law to negotiate or arbitrate appropriate interconnection agreements. n44

n42 *Id.* at p. 14.

n43 *Id.*

n44 *Id.* at p. 14.

D. The Initial Comments of AT&T

In its Initial Comments, AT&T expresses concern that the original Petition of the Rural LECs does not distinguish the traffic at issue as toll calls or local calls. AT&T is accordingly concerned that the Rural LECs are attempting to apply their access services tariff to both local and toll traffic. n45

n45 AT&T Initial Comments at pp. 1-2.

AT&T points out that pursuant to the Telecom Act, local exchange traffic provided by CLECs is subject to reciprocal compensation pursuant to § 251(b)(5) and currently defaults to bill and keep. On the other hand, exchange access traffic comes under § 251(g) of the Act and is subject to terminating access rates or bill and keep. [*26] AT&T asserts that the bill and keep arrangements between CLECs and the Rural LECs which are currently in place should be retained as such arrangements are contemplated by the Telecom Act and are appropriate for the current level of traffic exchanged between CLECs and independent LECs. AT&T accordingly concludes that the Commission should limit the scope of the declaratory proceeding sought by the Rural LECs to compensation arrangements regarding traffic originated by CMRS providers. AT&T asserts that under no circumstances should the Commission approve the application of the Rural LECs' access services tariffs to local traffic. n46

n46 *Id.* at pp. 3-4.

E. The Initial Comments of BellSouth

In its Initial Comments, BellSouth points out that the Petition of the Rural LECs appears to create an issue between the Rural LECs and CMRS providers who originate and terminate traffic to one another in the State of Alabama. BellSouth notes its belief that the Rural LEC tariff provisions at issue should not be applied [*27] to BellSouth due to the fact that BellSouth neither originates nor terminates the traffic in question. BellSouth points out that it has merely

agreed to provide a transitioning function for CMRS providers as well as other carriers, such as CLECs. n47 BellSouth contends that for local calls, it is the originating carrier, not the intermediate or transit carrier that owes the terminating carrier for transporting and terminating such calls. n48

n47 BellSouth Initial Comments at p. 1.

n48 *Id.* at p. 2.

BellSouth further notes that BellSouth and the Rural LECs entered into a settlement agreement approved by the Commission's Order of September 12, 2002, in Docket 28642. Pursuant to that settlement agreement, the Rural LECs agreed to bill CMRS providers directly for meet-point billed CMRS traffic that transits BellSouth's network and is terminated by the Rural LECs. For its part, BellSouth agreed to continue to pay the Rural LECs for CMRS traffic for which BellSouth is unable to provide call detail records to the Rural [*28] LECs for use in billing the CMRS providers directly. BellSouth contends that it has complied with the terms of that settlement agreement and is not responsible for payments to the Rural LECs for meet-point billed CMRS transit traffic pursuant to the Rural LEC tariff provisions at issue. n49

n49 *Id.* at p. 2.

III. SUMMARY OF THE REPLY COMMENTS RECEIVED

A. Overview

The Commission received Reply Comments in response to the July 31, 2002 Order from the Rural LECs and the Wireless Carriers. A more detailed analysis of those comments is set forth below.

B. The Reply Comments of the Rural LECs

In their Reply Comments, the Rural LECs assert that the Wireless Carriers have mischaracterized both the history and scope of the informal proceedings resulting from the Commission's September 12, 2002 Order in Docket 28642, including the informal discussions of the spring of 2003. In particular, the Rural LECs note that the mediation resulting from the September 12, 2003 Order of the Commission was intended [*29] to be between BellSouth and the ILECs, not the ILECs and the CMRS providers. n50

n50 Rural LEC Reply Comments at p.4.

The Rural LECs further point out that the discussions between the Rural LECs and the Wireless Carriers which did transpire were not part of a formal mediation or arbitration process under the Telecom Act. The Rural LECs emphasize that none of the Wireless Carriers have taken the formal steps necessary to begin such a formal mediation or arbitration process under the Telecom Act. In fact, the Rural LECs contend that the Wireless Carriers have attempted to tie any interim settlement rates to an agreement by the Rural LECs to essentially waive key protections afforded to them under the Telecom Act. n51

n51 *Id.* at p. 5; Citing § 251(f)(1)(A).

The Rural LECs also note that other detrimental ramifications from the indirect termination [*30] of wireless traffic could ensue without a grant of the relief requested by the Rural LECs. In particular, the Rural LECs assert that the problems associated with the indirect termination of CMRS traffic to Rural LECs could be exacerbated by the actions of some CMRS providers to obtain NPA/NXX codes and to instruct carriers to route such codes to the BellSouth tandems while rating such codes to a Rural LEC. n52 The Rural LECs contend that the relief they request

will eliminate such "zero sum games" now being played by some CMRS providers at the expense of the Rural LECs and others. n53

n52 *Id.* at p. 6; Citing BellSouth *Ex Parte* Presentation. *In the Matter of Developing a Unified Carrier Compensation Regime*, Docket No. CC-01-92 (FCC, cycle established September 30, 2002).

n53 *Id.*

The Rural LECs point out that contrary to the representations of the Wireless Carriers, the duty of the ILECs to "negotiate in good faith" agreements with other carriers to meet interconnection, resale and collocation [*31] obligations, is actually found in § 251(c)(2)(C) of the Telecom Act and not § 251(b)(5). The Rural LECs maintain that under the Telecom Act, § 251(c)(2)'s "good faith negotiation" requirement and the other requirements of § 251(c) do not apply to a Rural LEC until: (1) such company has received a bona fide request for interconnection services or network elements which is also filed with the state Commission; and (2) the state Commission determines that removing the exemption is "technically feasible" and will not be "unduly economically burdensome." In the event that such a finding is made, state Commissions are required to adopt an implementation schedule consistent with the FCC's regulations. n54 The Rural LECs note that none of the aforementioned events have occurred. n55

n54 *Id.* at p. 7; Citing § 251(f)(1)(a)-(b).

n55 *Id.*

The Rural LECs point out that no formal arbitration requests have been made by any CMRS provider at the Commission, nor has any CMRS provider sought an APSC Order removing any portion [*32] of the rural exemption as it applies to CMRS interconnection. The Rural LECs maintain that it is only logical that where Rural LECs who are exempt from the duty to negotiate are concerned, the arbitration window established under the Act does not come into play until the applicable state Commission has made a determination as to whether the exemption of a Rural LEC should be removed. n56

n56 *Id.*; Citing *Indiana Bell Telephone Company, Inc. v. Smithville Telephone Company, Inc.*, 31 F. Supp.2d 628, 632, f.2 (S.D. Ind. 1998) and *In Re Telephone Number Portability*, CC Docket No. 95-116, RM 8535, (Rel. July 2, 1996) P83.

The Rural LECs also dispute the contention of the Wireless Carriers that the delivery of third party CMRS traffic by BellSouth over common facilities constitutes "transport and termination" between the Rural LECs and the CMRS providers for purposes of the reciprocal compensation requirements. The Rural LECs maintain that while ILECs and CMRS providers are certainly free [*33] to agree to provide reciprocal compensation for such indirect traffic when requested to do so, it is a far cry from certain that they have an obligation to do so. n57 The ILECs in fact maintain that there can be no such obligation to provide reciprocal compensation where, as here, indirect traffic has been delivered to the ILEC prior to the establishment of binding arrangements providing for reciprocal compensation. n58

n57 *Id.* at p. 8; Citing *Alma Telephone Company, et al. v. Public Service Commission of the State of Missouri, et al.*, Cole County Circuit Court, Case No. 02CV324810, p. 4 (May 12, 2003) (quoting the Missouri Public Service Commission in *In the Matter of South Western Bell Telephone Company's Tariff Filing to Case No. TT-97-254, Report and Order*, p. 4 (Dec. 23, 1997)). n58 *Id.* at p. 9; Citing *Sprint Spectrum L.P., d-b-a Sprint PC, et al. v. Missouri Public Service Commission, et al.*, 2003 WL 1960681 (Mo. App. W.D. Apr. 29, 2003) and *Alma Telephone Company*.

[*34]

The Rural LECs note that CLECs and other carriers often obtain services under tariffs prior to negotiating an interconnection agreement that supercedes its terms. If such tariffs are not enforced, however, the Rural LECs maintain that they will not be in a position to ensure that they are compensated for traffic that is originated by CMRS providers who are under no compulsion to seek a prior interconnection agreement and whose traffic cannot contemporaneously be identified and blocked. n59

n59 *Id.*

The Rural LECs further point out that the Wireless Carriers chose not to include the Rural LECs in the negotiations whereby BellSouth was relieved of its responsibility to pay the Rural LECs for the delivery of indirect CMRS traffic. The Rural LECs assert that the knowledge that the Rural LECs cannot effectively block the delivery of indirect CMRS traffic in the event of nonpayment has led many Wireless Carriers to elect not to establish direct interconnection agreements and to ignore bills sent by the Rural LECs under [*35] existing tariffs. The Rural LECs also reemphasize that the Wireless Carriers could have sought to supercede the tariffs at issue by invoking their remedies under the Act but have failed to do so. n60

n60 *Id.* at p. 9.

The Rural LECs further maintain that the rates in the tariff they seek to impose herein are approximately one half of the effective intrastate access rates of most of the Rural LECs and constitute the rate that was previously paid to the Rural LECs without objection prior to the change in meet-point billing agreements. The Rural LECs contend that the mere allegations of the Wireless Carriers that the tariffed rates are unreasonable does not impact the lawfulness of said tariffs. The Rural LECs maintain that they are fully prepared to support the reasonableness of their rates on a going forward basis in any future proceedings. n61

n61 *Id.* at p. 10.

[*36]

C. The Reply Comments of the Wireless Carriers

In their Reply Comments, the Wireless Carriers again reiterate that § 251(b)(5) of the Telecom Act obligates all ILECs, including Rural carriers, to establish reciprocal compensation arrangements for the exchange of telecommunications traffic pursuant to the requirements of the Telecom Act and the FCC's rules. The Wireless Carriers maintain that they have consistently expressed a willingness to provide compensation outside the tariffs of the Rural LECs and to negotiate formal reciprocal compensation agreements. Despite those attempts at good faith negotiations, the Wireless Carriers maintain that the Rural LECs have terminated, without notice, the negotiation process by filing their Petition for Declaratory Relief under consideration herein.

The Wireless Carriers again maintain that the tariff provisions in question in this cause violate the negotiation and arbitration process set forth in §§ 251 and 252 of the Telecom Act and have been rejected at both the state and federal level. The Wireless Carriers contend that § 252 of the Telecom Act provides telecommunications carriers with only two options for arriving at the agreements [*37] mandated by the Telecom Act, either through voluntary negotiations or compulsory arbitration. The Wireless Carriers maintain that tariffs have been expressly rejected by both the federal courts and other state Commissions as an acceptable means of establishing reciprocal compensation for indirect traffic terminated by CMRS providers. n62

n62 Wireless Carriers Reply Comments at pp. 1-3; *Citing Wisconsin Bell, Inc. v. Bie.*, 340 F.3d 441 (7th Cir. 2003); *Verizon North, Inc. v. Strand*, 309 F.3d 935, 937-44 (6th Cir. 2002); *3 Rivers v. U.S. West*, No. CV-99-8-GF-CSO, at 50 (D. Mont. 2003) ("*3 Rivers v. U.S. West*"); *CenturyTel of Oregon, Inc.*, Staff Recommendation, Public Utilities Commission of Oregon (Docket No. UT156/Advice No. 246, July 1, 2003); *Exchange or Transit*

Traffic, Iowa Utilities Board, Order Aff'g Proposed Decision and Order, Docket Nos. SPU-00-7, TF-00-275 (DRU-00-2) (Mar. 18, 2002).

The Wireless Carriers maintain that they issued [*38] a request to the Rural LECs to commence collective negotiations for the establishment of reciprocal compensation arrangements under the Act on April 2, 2003, and simultaneously submitted a very generous offer for compensation during the interim period while the negotiations were underway. The Wireless Carriers maintain, however, that the Rural LECs refused to acknowledge the §§ 251 and 252 request and effectively rejected the interim compensation offer instead choosing to file the instant petition. n63

n63 *Id.* at pp. 3-4.

Consistent with the weight of federal and state authority, the Wireless Carriers maintain that the Commission should reject the Rural LEC attempt to apply the provisions from the existing access and general subscriber tariffs to the termination of wireless traffic. They maintain that such an action by the Commission would undermine the negotiation/arbitration process set forth in the Telecom Act by removing any economic incentive for the Rural LECs to voluntarily enter an agreement. The Wireless [*39] Carriers maintain that the Commission should alternatively hold the Petition of the Rural LECs in abeyance until the FCC rules on pending proceedings addressing wireless termination tariffs which involve the same issues raised in this proceeding. n64 Given the FCC's exclusive jurisdiction over issues relating to CMRS interconnection, the Wireless Carriers maintain that the Commission should defer consideration. n65

n64 *Id.* at p 4; *Citing Petition of T-Mobile USA, Inc. et al. and US LEC Corp. for Declaratory Ruling* (DA-02-2436) and CC Docket No. 01-92.

n65 *Id.* at pp. 4-5.

The Wireless Carriers further argue that despite the Rural LEC representations to the contrary, the dispute resolution process set forth in § 252(b) of the Act applies to the establishment of reciprocal compensation arrangements for the indirect traffic at issue. The Wireless Carriers maintain that the Commission should deny the Rural LEC claims in this regard as they are merely intended to delay the negotiation/arbitration process [*40] set forth in the Act. n66

n66 *Id.* at p. 5.

The Wireless Carriers further maintain that the Rural LECs' claimed § 251(f)(1) exemption does not diminish their obligation to establish reciprocal compensation or indirect interconnection. The Wireless Carriers argue that according to the express language of § 251(f), any exemption the Rural LECs may have from the negotiation and arbitration process of the Telecom Act only applies to the "direct" interconnection obligations set forth in § 251(c) of the Telecom Act. The Wireless Carriers maintain that the obligation to negotiate reciprocal compensation arrangements for the exchange of indirect traffic is not subject to the rural exemption and, therefore, the Rural LECs cannot avoid their obligations by raising that exemption. The Wireless Carriers assert that the FCC has already considered that issue and determined that the benefits of implementing such agreements outweighs the costs incurred by Rural Carriers to measure the involved traffic. n67

n67 *Id.* at p. 6; *Citing FCC's Local Competition Order* at P1045.

[*41]

The Wireless Carriers further argue that the tariffed rates proposed by the Rural LECs violate the statutory requirements of the Telecom Act mandating that rates for local interconnection must be based on forward-looking costs and must be reciprocal. n68 The Wireless Carriers again assert that the tariffs of the Rural LECs are neither cost based

nor reciprocal. The Wireless Carriers maintain that contrary to the arguments of the Rural LECs, the tariffs at issue are access tariffs and are not wireless termination tariffs. n69

n68 *Id.* at p. 7; Citing 47 U.S.C. § § 251(c) and 252(d); *Developing a Unified Intercarrier Compensation Regime*, Notice of Proposed Rulemaking, 66 Fed. Reg. 28, 410, P92 and n. 148 (rel. Apr. 27, 2001).

n69 *Id.*

The Wireless Carriers also argue that § 251(b)(5) obligates the Rural LECs to establish reciprocal compensation arrangements with CMRS providers. Contrary to the arguments of the Rural LECs, the Wireless Carriers [*42] maintain that the indirect CMRS traffic at issue in this proceeding is subject to the reciprocal compensation requirements of § 251(b)(5) of the Act. More specifically, the Wireless Carriers note that the FCC has determined that traffic which is exchanged between CMRS providers and ILECs within a single MTA is subject to the reciprocal compensation obligations of § 251(b)(5). n70

n70 *Id.* at pp. 8-9; Citing 47 C.F.R. § 51.701(b)(2); The FCC's *Local Competition Order at P1033 and In the Matter of Total Telecommunications Services, Inc. and Atlas Telephone Company, Inc. v. AT&T Corp.*, Memorandum, Opinion and Order, 16 FCC Rcd. 5726 (2001).

The Wireless Carriers note that the indirect or transiting traffic at dispute in this proceeding is completely between the customers of the CMRS providers and the Rural LECs within a single LATA and is, therefore, by definition, subject to reciprocal compensation. The Wireless Carriers maintain that the only distinction between this indirect [*43] traffic and direct traffic which is routed through intercarrier facilities between the CMRS providers and the Rural LECs is that the indirect traffic at issue in this proceeding is transported and terminated in part by another ILEC's facilities. Under such circumstances, the Wireless Carriers maintain that the FCC has ruled that reciprocal compensation rather than access applies. n71

n71 *Id.* at pp. 9-10; Citing *Texcom, Inc., d/b/a Indiana v. Bell Atlantic Corp., d/b/a Verizon Communications*, FCC 01-347, at PP6-10 (Nov. 26, 2001) ("*Texcom*").

The Wireless Carriers further dispute the Rural LEC position that the Rural LECs are required to enter into direct interconnection agreements with CMRS providers, but are not required to enter into reciprocal compensation arrangements for indirect traffic. The Wireless Carriers maintain that such a distinction under the Telecom Act is devoid of any support and is in defiance of the FCC's holding that small ILECs "have a duty to establish reciprocal compensation arrangements" [*44] with other ILECs and CMRS carriers. n72

n72 *Id.* at p. 10; Citing *Local Competition Order* at P1045.

The Wireless Carriers note that the FCC's rules apply generally to "transport and termination of local telecommunications traffic" and make no distinctions between "direct" or "indirect" traffic as intimated by the Rural LECs. The Wireless Carriers accordingly assert that the FCC's rules support their position that § 251(b)(5) applies to all forms of interconnection covered by § § 251(a) - (c) of the Telecom Act including indirect interconnection. n73

n73 *Id.* at p. 11.

The Wireless Carriers further maintain that the FCC has specifically addressed the issue of indirect interconnection between LECs and CMRS providers by noting that "in rural settings Wireless Carriers can elect to deliver CMRS originated calls to a large ILEC (typically a Regional [*45] Bell Operating Company or RBOC) for routing to the Rural LEC carrier." n74 The Wireless Carriers further maintain that the FCC has specifically recognized a terminating ILECs costs for terminating CMRS traffic delivered by such indirect interconnection is subject to "reciprocal compensation." n75

n74 *Id.* at p. 11; Citing *Unified Carrier Compensation Regime* at P91 and note 148.

n75 *Id.*; Citing *Unified Intercarrier Compensation Regime* at P91.

The Wireless Carriers lastly argue that the FCC and several state Commissions have held that reciprocal compensation applies to traffic that is exchanged indirectly through a transiting carrier. According to the Wireless Carriers, the FCC recognized in the *Texcom* decision that where two carriers exchange traffic indirectly via a third party, the FCC's rules do not provide for the intermediate transit carrier to collect reciprocal compensation, but such reciprocal compensation rules do apply between the originating and terminating carrier. n76 Specifically, the [*46] Wireless Carriers maintain that the FCC held in the *Texcom* case that while the "reciprocal compensation rules do not provide for such compensation to a transiting carrier," those "rules (do) provide a mechanism for a terminating carrier, ... to recover from originating carriers the cost of the facilities at issue." n77

n76 *Id.* at p. 12; Citing the *Texcom* Decision at P4.

n77 *Id.*

According to the Wireless Carriers, other state Commissions such as the Commission in Oklahoma have reviewed the issue of direct versus indirect interconnection and have concluded that "Each carrier must pay each other's reciprocal compensation for all intra-MTA traffic whether the carriers are directly or indirectly connected, regardless of an intermediary carrier." n78 The Wireless Carriers accordingly maintain that the Rural LECs' claim that the Telecom Act's § 251 reciprocal compensation obligations apply only to "direct interconnection" between the networks of two carriers is thus demonstrably false. n79

n78 *Id.* at p. 12; Citing *Interlocutory Order, Application of Southwestern Bell Wireless, LLC for Arbitration under the Telecommunications Act of 1996*, Order No. 466613, at 4 (Okla. P.U.C. Aug. 9, 2002). [*47]

n79 *Id.* at p. 13.

IV. THE ORAL ARGUMENTS

Pursuant to a Joint Petition filed on October 10, 2003, the Wireless Carriers sought oral argument regarding the issues presented by the parties to this cause. The Commission granted said oral argument request and afforded the parties the opportunity to argue their points before the Commission. The Order establishing the oral argument in question for December 2, 2003 was entered on November 14, 2003. The Rural LECs, the Wireless Carriers, BellSouth and AT&T and appeared on December 2, 2003 and presented oral argument. The parties did not request permission to submit briefs following oral argument and the Commission did not require the parties to do so.

V. FINDINGS AND CONCLUSIONS

One of the fundamental principles of utility law is the notion that utilities have the constitutional right to a fair and reasonable return on their investment. n80 In fact, this Commission has a legal responsibility to ensure that the facilities in which utilities have invested are not utilized in a manner that is confiscatory to the utility in question. n81 It [*48] is that fundamental concept that drives our decision in this cause.

n80 *Taffet v. Southern Co.*, 967 F.2d 1483 (11th Cir. 1992).

n81 *Smith v. Illinois Bell Telephone Company*, 270 U.S. 587, 591-592, 46 S. Ct. 408, 70 L. Ed. 747 (1926).

It is undisputed in the foregoing pleadings that the Wireless Carriers are indirectly terminating CMRS traffic on the networks of the Rural Carriers over common facilities operated by BellSouth. It is also undisputed that the Rural LECs incur costs in terminating such traffic. Perhaps of even more interest is the fact that the Wireless Carriers have not challenged the general claim of the Rural LECs that a substantial portion of the indirect CMRS traffic at issue is being terminated by the Rural LECs without compensation at present.

The Wireless Carriers do maintain, however, that they have been, and continue to remain, ready, willing and able to negotiate reciprocal compensation arrangements [*49] for the indirect CMRS traffic in question. The Wireless Carriers in fact assert that the tariff provisions which the Rural LECs seek to enforce with respect to the indirect CMRS traffic at issue contravene the comprehensive scheme set forth by the Telecom Act for the adoption of interconnection agreements and/or reciprocal compensation arrangements for such traffic. The Wireless Carriers have indeed raised what appear to be compelling legal arguments with respect to the requirements imposed by the Telecom Act on incumbent local exchange carriers such as the Rural LECs with regard to the negotiation of interconnection agreements and/or reciprocal compensation arrangements.

The Telecom Act indeed imposes a duty on each local exchange carrier at § 251(b)(5) to "establish reciprocal compensation arrangements for the transport and termination of telecommunications." Additional obligations are imposed on incumbent local exchange carriers at § 251(c). In particular, § 251(c)(1) imposes on incumbent LECs the duty to "negotiate in good faith in accordance with § 252 the particular terms and conditions of agreements to fulfill the duties described ..." in § § 251(b)(1) - (5). The provisions [*50] of § § 252(a) -- (d) provide a procedure for compulsory arbitration in the event that the negotiations commenced are unfruitful and do not yield a mutually acceptable agreement. A mediation provision is also established at § 252(a)(2).

Notably, the term "local exchange carrier" as defined by the Telecom Act at § 153(26), expressly excludes providers of "commercial mobile radio service." Since the Wireless Carriers in this proceeding are undeniably providers of commercial mobile radio service, they are clearly excluded from the Telecom Act's definition of local exchange carriers and cannot be compelled to comply with any of the duties that the Act establishes for local exchange carriers, including the duty to submit to compulsory arbitration. However, as "telecommunications carriers" pursuant to § 153(44) of the Telecom Act, the Wireless Carriers can petition the applicable state Commission to invoke the mandatory arbitration provisions of § 252 with respect to any ILEC with which they formally initiate negotiations pursuant to § § 251 and 252.

The availability of the above-described statutory scheme for negotiation and/or arbitration is somewhat complicated, however, by the provisions [*51] of § 251(f)(1)(A) which provide an exemption from the requirements of § 251(c) for rural telephone companies. Said exemption provides that the requirements of § 251(c) "shall not apply to a rural company until (i) such company has received a bona fide request for interconnection, service, or network elements, and (ii) the state Commission determines ... that such request is not unduly economically burdensome, is technically feasible, and is consistent with § 254 ..."

In the present case, the Rural LECs have made known to the Wireless Carriers their claim of a § 251(f) exemption from all the provisions of § 251(c), including the requirement that they engage in the good faith negotiations envisioned for reaching the type of agreements necessary to fulfill the duties set forth at § 251(b)(1)(5). The Rural LECs correctly point out, however, that the Wireless Carriers have not made a § 251(f)(1)(B) "bona fide request" for interconnection, services or network elements which would trigger an assessment by this Commission regarding the possible termination of the exemption claimed by the Rural LECs. We find merit in the Rural LECs' claim that the submission of such a bona fide request by [*52] the Wireless Carriers would be a necessary prerequisite to removal of the claimed rural exemption and/or any petition for compulsory arbitration pursuant to the requirements of § 252. More particularly, we conclude that the exemption claimed by the Rural LECs would likely have to be terminated in order for the Wireless Carriers to otherwise invoke the compulsory arbitration provisions of § 252.

In any event, it is clear that the power to invoke the provisions of the Telecom Act with respect to removal of the rural exemption claimed by the Rural LECs and/or the processing of any petitions for compulsory arbitration rests exclusively with the Wireless Carriers. Even if the Rural LECs did not claim the § 251(f)(1) rural carrier exemption,

the Rural LECs could not compel the Wireless Carriers to negotiate and/or arbitrate with respect to reciprocal compensation for the indirect CMRS traffic at issue because the Wireless Carriers are not local exchange carriers under the Telecom Act's definitions. The Wireless Carriers are not, therefore, subject to the affirmative obligations which § 251 and 252 impose on local exchange carriers like the Rural LECs.

On the other hand, the Wireless Carriers [*53] are telecommunications carriers pursuant to § 153(44) and can thus undertake the measures in the Telecom Act that are necessary to remove the rural exemption claimed by the Rural LECs and/or seek compulsory arbitration pursuant to the requirements of § 252. It appears likely that the decision of the Wireless Carriers not to invoke the applicable provisions of the Telecom Act is attributable to the fact that the Wireless Carriers are currently terminating indirect CMRS traffic on the networks of the Rural LECs at no cost in most instances.

Although the efforts of the Wireless Carriers to informally reach agreement with the Rural LECs regarding compensation for the indirect CMRS traffic at issue have been commendable, those efforts have conspicuously not extended to the formal actions which would have certainly triggered the provisions of the Telecom Act which the Wireless Carriers so vigorously defend. We accordingly disagree with the contention of the Wireless Carriers that strict enforcement of the tariff provisions in question would supplant and/or circumvent the federally established requirements of the Telecom Act with respect to negotiation, arbitration and/or the establishment [*54] of reciprocal compensation. To the contrary, the Wireless Carriers have the clear and unilateral option of invoking the remedies of the Telecom Act to address the issues they have presented, but have chosen not to exercise that option.

Based on the foregoing, we find that this Commission has an obligation to preclude the Wireless Carriers from continuing to terminate the bulk of their indirect traffic on the networks of the Rural LECs without payment while the Wireless Carriers mull their decision of whether to invoke the Telecom Act's provisions. We find that strict enforcement of the tariffs in question with respect to indirect CMRS traffic would ensure that the Rural LECs receive compensation for the use of their respective networks until such time as the provisions of the Telecom Act regarding compensation for the traffic in question are implemented by the Wireless Carriers.

We note that federal courts have recognized the right of states to enforce tariff provisions which are not inconsistent with the Telecom Act. n82 In this case, it is not the Commission's intention to supplant or circumvent the provisions of the Telecom Act which would likely address the issues raised in this [*55] proceeding. We are merely seeking to provide a justified measure of relief for what we see as a void in the Telecom Act's coverage by virtue of the status of the parties to this dispute. As the Rural LECs have repeatedly noted, any existing and/or future agreements entered into between the Rural LECs and the Wireless Carriers will, on the date that they are approved by the Commission pursuant to the applicable provisions of the Act, supersede the tariffed rates that we have decided should be strictly enforced. Thus, the full scope of the Telecom Act's remedies remain available to the Wireless Carriers regardless of our action herein.

n82 *Michigan Bell Telephone Company v. MCI*, 123 F.Supp. 2d 1043, 1054 (Ed. Mich. 2001).

Based on the foregoing, we conclude that the previously approved tariff provisions of the Rural LECs which delineate the compensation to be paid for terminating traffic transported over BellSouth facilities pursuant to interconnection or resale arrangements between BellSouth [*56] and other telecommunications providers should be enforced with respect to the indirect CMRS traffic which is the subject of this proceeding. n83 We find that our decision in this regard represents the course of action which is most consistent with the public interest, convenience and necessity and is not inconsistent with the Telecom Act.

n83 See Appendix B attached hereto for the specific tariff provisions of each Rural LEC.

We further conclude that an additional mediation session in this cause would likely be productive. We accordingly find that the parties to this cause should be required to participate in an additional, Commission supervised mediation session to be held on February 10, 2004, in the main hearing room in the Commission's Carl L. Evans Hearing Complex in Montgomery, Alabama at 9:30 A.M. The parties shall notify the Commission in writing of the individuals that will be participating in the mediation session by February 6, 2004. Each of the parties shall have individuals who are authorized

to approve [*57] settlement terms in attendance at the mediation. In order to allow for said mediation session, the effective date of this Order will be delayed for forty-five (45) days.

IT IS SO ORDERED BY THE COMMISSION.

IT IS FURTHER ORDERED BY THE COMMISSION, That consistent with the above language, this Order shall be effective on the forty-fifth day following its entry and attestation.

IT IS FURTHER ORDERED BY THE COMMISSION, That the tariff provisions discussed in this Order shall not be applied to BellSouth as the intermediate carrier of the CMRS traffic at issue in this cause.

IT IS FURTHER ORDERED BY THE COMMISSION, That jurisdiction in this cause is hereby retained for the issuance of any further order or orders as may appear to be just and reasonable in the premises.

DONE at Montgomery, Alabama, this 26th day of January, 2004.

ALABAMA PUBLIC SERVICE COMMISSION

Jim Sullivan, President

Jan Cook, Commissioner

George C. Wallace, Jr., Commissioner

APPENDIX "A"

DOCKET 28988 - # 32

DOCKET 28988

Ardmore Telephone Company, Inc.

Blountsville Telephone Company

Butler Telephone Company, Inc.

Brindlee Mountain Telephone Company

Castleberry Telephone Company, Inc.

CenturyTel of Alabama, LLC*

Farmers [*58] Telephone Cooperative, Inc.

Frontier Communications of Alabama, Inc.

Frontier Communications of Lamar County, Inc.

Frontier Communications of the South, Inc.

GTC, Inc., d/b/a GT Com

Graceba Total Communications, Inc.

Gulf Telephone Company

Hayneville Telephone Company, Inc.

Hopper Telecommunications Co., Inc.

Interstate Telephone Company

Millry Telephone Company, Inc.

Mon-Cre Telephone Cooperative, Inc.

Moundville Telephone Company, Inc.

National Telephone of Alabama, Inc.

New Hope Telephone Cooperative, Inc.

Oakman Telephone Company, Inc.
 Otelco Telephone, LLC (formerly Oneonta Telephone Company, Inc.)
 Peoples Telephone Company, Inc.
 Pine Belt Telephone Company, Inc.
 Ragland Telephone Company, Inc.
 Roanoke Telephone Company, Inc.
 Union Springs Telephone Company
 Valley Telephone Company

APPENDIX "B"

DOCKET 28988 - # 33

DOCKET 28988

Company	Tariff Section(s)
Gulf Telephone Company	§ 200.1 Intrastate Access Services Tariff
Ardmore Telephone Company, Inc.	§ 200.1 A -- Concurs with Gulf Telephone Company's Interstate Access Services Tariff
Blountsville Telephone Company, Inc.	§ 200.1 -- Concurs with Gulf Telephone Company's Interstate Access Services Tariff
Butler Telephone Company, Inc.	§ 200.1 - Concurs with Gulf Telephone Company's Interstate Access Services Tariff
Brindlee Mountain Telephone Company	§ 200.1.A p.3 -- Concurs with Gulf Telephone Company's Interstate Access Services Tariff
Castleberry Telephone Company, Inc.	§ 200.1 - Concurs with Gulf Telephone Company's Interstate Access Services Tariff
Farmers Telephone Cooperative, Inc.	§ 200.1 -- Concurs with Gulf Telephone Company's Interstate Access Services Tariff
Floralta Telecommunications, d/b/a GTC, Inc., d/b/a GT Com	§ 200.1.A
Frontier Communications of Alabama, Inc.	§ 200.1 p.5
Frontier Communications of Lamar County, Inc.	§ 200.1 p.5 -- Concurs with Gulf Telephone Company's Interstate Access Services Tariff
Frontier Communications of the South, Inc.	§ 200.1 p.6
Graceba Total Communications, Inc.	§ 200.1 -- Concurs with Gulf Telephone Company's Interstate Access Services Tariff

Company	Tariff Section(s)
Hayneville Telephone Company, Inc.	§ 200.1 p.3
Hopper Telecommunications Company, Inc.	§ 200.1 -- Concurs with Gulf Telephone Company's Interstate Access Services Tariff
Interstate Telephone Company, Inc.	§ 200.1 p.2
Millry Telephone Company, Inc.	§ 200.1 -- Concurs with Gulf Telephone Company's Interstate Access Services Tariff
Mon-Cre Telephone Cooperative, Inc.	§ 200.1 -- Concurs with Gulf Telephone Company's Interstate Access Services Tariff
Moundville Telephone Company, Inc.	§ 200.1 -- Concurs with Gulf Telephone Company's Interstate Access Services Tariff
National Telephone of Alabama, Inc., d/b/a Cherokee Telephone Company	§ 200.1 p.1
New Hope Telephone Cooperative, Inc.	§ 200.1 -- Concurs with Gulf Telephone Company's Interstate Access Services Tariff
Oakman Telephone Company, Inc.	§ 200.1 -- Concurs with Gulf Telephone Company's Interstate Access Services Tariff
Otelco Telephone, LLC	§ 200 -- Concurs with Gulf Telephone Company's Interstate Access Services Tariff
Peoples Telephone Company	§ 200.1 -- Concurs with Gulf Telephone Company's Interstate Access Services Tariff
Pine Belt Telephone Company, Inc.	§ 200.1 -- Concurs with Gulf Telephone Company's Interstate Access Services Tariff
Ragland Telephone Company, Inc.	§ 200.1 -- Concurs with Gulf Telephone Company's Interstate Access Services Tariff
Roanoke Telephone Company, Inc.	§ 200.1 p.1
Union Springs Telephone Company	§ 200.1 -- Concurs with Gulf Telephone Company's Interstate Access Services Tariff
Valley Telephone Company	§ 200.1 p.2